STATE OF MICHIGAN

IN THE SUPREME COURT

ROBERT ARBUCKLE, Personal Representative
of the Estate of CLIFTON M. ARBUCKLE,

Appellee,

v

GENERAL MOTORS LLC,

Appellant.

Supreme Court No. 151277
Court of Appeals No. 310611
MCAC LC No. 11-000043

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AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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JURISDICTIONAL STATEMENT

The Michigan Association for Justice submits this amicus curiae brief pursuant to the Supreme Court's December 25, 2015 and February 3, 2016 orders.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the MCAC and magistrate erroneously reversed Director Nolish's ruling that GM's workers' compensation benefits reduction formula violates MCL 418.354(11), necessitating either denial of GM's application for leave, affirmance of the Court of Appeals' decision, or remand to the Court of Appeals for consideration of this issue.

Appellee Arbuckle states: Yes.

The Michigan Association for Justice states: Yes.

Appellant General Motors LLC states: No.

The Court of Appeals did not address this issue.

The MCAC states: No.

The Agency magistrate states: No.

Workers' Compensation Agency Director Nolish states: Yes.

II. Federal law does not preempt the requirement that GM prove that coordination of Arbuckle's workers' compensation benefits does not violate MCL 418.354(11).

Appellee Arbuckle states: Yes.

The Michigan Association for Justice states: Yes.

Appellant General Motors LLC states: No.

The Court of Appeals and lower tribunals did not address this issue.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state.

On December 23, 2015, this Court entered a MOA order directing the parties to file supplemental briefs. *Arbuckle v General Motors LLC*, ___ Mich ___; 872 NW2d 492 (Dec 23, 2015). The order invited specified organizations to file briefs amicus curiae. *Id*. The order further stated that "[o]ther persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae." *Id*. Before entry of the MOA order, two organizations, the Michigan Manufacturers Association ("MMA") and Michigan Self Insurers' Association ("MSIA"), filed amicus curiae briefs.

This is a jurisprudentially significant appeal. It centrally addresses whether MCL 418.354(11) precludes Appellant General Motors LLC ("GM") from reducing workers' compensation benefits based on the amount of social security disability benefits received. This issue affects many Michigan citizens.[1] The MAJ accordingly moved for leave to file an amicus curiae brief. On February 3, 2016, this Court granted leave for the MAJ to file this brief. (2/3/16 order).

[1] According to the MSIA's amicus curiae brief, Appellant GM "currently has approximately 1,500 open claims like the instant case, *e.g.*, claims where it seeks to coordinate retirees' disability pensions under the formula at issue here." (MSIA brief, p 5). The MSIA does not cite record evidence to support this statement, but only alleged hearsay information relayed by "General Motors' personnel." (Id, p 5 n 1). Nonetheless, if true, it confirms that this matter addresses the weekly workers' compensation benefits of hundreds of Michigan citizens.

STATEMENT OF FACTS

The MAJ relies on the fact statements in the Court of Appeals' February 10, 2015 decision, GM's application for leave, and Appellee Arbuckle's brief in opposition to GM's application for leave. The following, pertinent facts bear emphasis:

1. Pursuant to a pension agreement and a 1990 Letter of Agreement, GM did not reduce employees' workers' compensation benefits based on disability pension benefits. (COA decision, p 1).

2. "On February 25, 1995, a workers' compensation magistrate awarded plaintiff workers' compensation benefits at a fixed rate of $362.78 a week, 80 percent of plaintiff's after-tax weekly wage at the time of his injury." (COA decision, p 1). The award ordered GM to pay Arbuckle at this weekly rate "until further order of the Bureau/[Agency.]" (Arbuckle 4/27/15 brief, p 5; citation omitted). Based on the 1990 Letter of Agreement, there was no coordinated reduction of Arbuckle's workers' compensation benefits. (COA decision, p 1).

3. After issuance of the Bureau's award, Arbuckle was granted Social Security Disability ("SSDI") benefits in the amount of $238.57 per week. (GM application, p 8). Under the mandate of 20 CFR § 404.408, which requires reduction of social security disability benefits if the individual is also "entitled to a periodic benefit (including workers' compensation or any other payments based on a work relationship) on account of a total or partial disability" under a federal or state law, *Nicely v McBrayer, McGinnis, Leslie, & Kirkland*, 163 F3d 376 (CA 6, 1998), citing 20 CFR § 404.408(a)(2)(i) and 42 USC § 424a, Arbuckle's SSDI benefits were lowered.

4. In 2007, GM and the UAW negotiated a Letter of Agreement, "applicable to employees retiring after the effective date of the 2007 agreement, which permitted defendant to apply a new formula when determining whether a disability retiree's workers' compensation benefits could be reduced." (COA decision, p 2).

5. The agreement provided the following formula applicable to "employees who are injured and retire on or after October 1, 2007": "workers' compensation payments for such employees shall be reduced by disability retirement benefits payable under the Hourly-Rate Employees Pension Plan to the extent that the combined workers' compensation payments, initial Social Security Disability Insurance Benefit Amount, and the initial disability retirement benefit (per week) exceed the employee's gross Average Weekly

Wage at the time of the injury . . . ." (COA decision, p 2; emphasis added).

6. When GM and the UAW negotiated the 2007 Letter of Agreement, they anticipated that the workers' compensation benefit reduction formula potentially violated MCL 418.354. (Arbuckle 4/27/15 brief, p 10 n 3). The original agreement provided that, if the Michigan Court of Appeals or Supreme Court rules that the reduction violates MCL 418.354(14), GM "agreed to stop reductions." (Id).

7. In 2009, GM and the UAW negotiated a new agreement applying the reduction to all employees retiring before January 1, 2010. (COA decision, p 2).

8. Without seeking a "further order" of the Workers' Compensation Agency, on January 19, 2010, GM notified Arbuckle that it would unilaterally start reducing Arbuckle's workers' compensation benefits based on the formula in the 2007 Letter of Agreement. (COA decision, pp 2-3).

9. After receiving this letter, plaintiff requested a hearing before the director of the Workers' Compensation Agency. (COA decision, p 3). Arbuckle specifically challenged GM's "improper use of SSDIB [social security disability benefits] as a setoff to the weekly benefits award" under MCL 418.354(11)[.]" (MSIA brief, p 5, citing Rule V Order, mailed November 3, 2010, p 4; emphasis removed).

10. Following rulings by Agency Director Nolish, Magistrate Birch, the MCAC, and the Court of Appeals, the Supreme Court issued the December 23, 2015 MOA order.

On leave granted, the MAJ now submits its amicus curiae brief. For the reasons presented, the MAJ respectfully requests that this Honorable Court either deny Appellant GM's application for leave to appeal, affirm the February 10, 2015 Court of Appeals decision, or remand to the Court of Appeals for consideration of the issue whether GM's workers' compensation benefit reduction formula violates MCL 418.354(11).

ARGUMENT

I. THE MCAC AND MAGISTRATE ERRONEOUSLY REVERSED DIRECTOR NOLISH'S RULING THAT GM'S WORKERS' COMPENSATION BENEFIT REDUCTION FORMULA VIOLATES MCL 418.354(11). FOR THIS REASON, THE SUPREME COURT SHOULD DENY GM'S APPLICATION FOR LEAVE, AFFIRM THE COURT OF APPEALS' DECISION, OR REMAND THE MATTER TO THE COURT OF APPEALS FOR CONSIDERATION OF THIS ISSUE.

GM has not met its burden of proving that its coordination of Arbuckle's workers' compensation benefits complies with MCL 418.354. Agency Director Nolish correctly ruled that GM's formula violates MCL 418.354(11). The magistrate and MCAC erroneously reversed.

While the Court of Appeals did not reverse the MCAC's opinion on this basis, it stands as an alternate reason to deny GM's application for leave or affirm the February 10, 2015 decision. See *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations omitted) (this Court "may uphold a lower tribunal's decision that reached the correct result, even if for an incorrect reason"); see also *American Alternative Ins Co, Inc v York,* 470 Mich 28, 33, 679 NW2d 306 (2004) (affirming Court of Appeals for reaching correct result). At a minimum, this matter should be remanded to the Court of Appeals for consideration whether GM's formula violates MCL 418.354(11).[2]

[2] The MAJ supports Arbuckle's arguments in this appeal. The MAJ submits this amicus curiae brief to specifically address the fact that GM has failed to meet its burden of proving that its coordination formula complies with MCL 418.354(11).

A. Once Arbuckle challenged reduction of his workers' compensation benefits in the Workers' Compensation Agency, GM has the burden of proving entitlement to, and the propriety of, coordination under MCL 418.354.

GM's amicus, the MSIA, mistakenly argues that GM does not have the burden of proving either entitlement to modify the Agency's February 25, 1995 award and coordinate Arbuckle's workers' compensation benefits or that its formula complies with MCL 418.354. Michigan law is clear that, once Arbuckle challenged reduction of his workers' compensation benefits in the Agency, MCL 418.354(10) established GM's burden of proof.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Adrian School District v Michigan Public School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). If, however, "the language of the statute is clear, no further analysis is necessary or allowed." *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) (citation omitted).

When addressing a clear and unambiguous statute, Michigan courts must "assume that the Legislature intended its plain meaning" and enforce the statute "as written." *Roberts v Mencosta County General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (citation omitted). It is well-accepted that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived

from the words of the statute itself." *Id* (citation omitted).[3]

MCL 418.354(10) states that "[t]he employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the agency the amount of any credit or reduction, and as requested by the agency, furnish to the agency satisfactory proof of the basis for a credit or reduction." *Id* (emphasis added). The text of MCL 418.354(10) unambiguously establishes that, although an employer coordinating workers' compensation benefits need only report the amount of credit or reduction to the agency, once requested, the employer "must furnish to the agency satisfactory proof of the basis" for the coordination. *Id*.

[3] The Supreme Court has repeatedly overruled prior precedent which it concluded had misread a statute's plain wording. For example, in *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007), the Court overruled *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996) (and abrogated other cases) which added a "prejudice" requirement to the notice provision in MCL 691.1404(1). The Court emphasized that "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Id* at 219 (citation omitted). In *Devillers v Auto Club Ins Assoc*, 473 Mich 562; 702 NW2d 539 (2005), as another example, the Court overruled the long-standing cases of *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986) and *Johnson v State Farm Mut Auto Ins* Co, 183 Mich App 752; 455 NW2d 420 (1990), which held that the limitations periods in MCL 500.3145(1) were tolled until the insurer formally denied the claim. *Devillers* characterized the judicial tolling holdings of Lewis and Johnson as "judicial defiance . . . for the plainly expressed will of the Legislature" and "judicial usurpation of the legislative function." *Id*, 473 Mich at 585 (original emphasis). Among the many other cases where the Supreme Court has overruled prior cases for misreading statutes are: *Gladych, supra* (overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971) for imposing a tolling rule not present in the statute of limitations); *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) (overruling *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994) for misconstruing the causation provision in MCL 691.1407(c)(2)); *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382; 605 NW2d 308 (2000) (overruling *Preferred Risk Mut Ins Co v State Farm Mut Automobile Ins Co*, 123 Mich App 416; 333 NW2d 303 (1983) for imposing "judicial tolling" on the one-year limitation period for property damage claims under the No-Fault Act, MCL 500.3145(2)).

Michigan courts and the MCAC have long held that, in a contested agency proceeding, the employer has the burden of proving the propriety of benefit coordination. See *Black v Michigan Bell Telephone*, 128 Mich App 606, 608; 341 NW2d 157 (1983) (holding that defendant employer did not met its burden of proving right to offset workers' compensation benefits), approved in *Maner v Ford Motor Co*, 196 Mich App 470, 485-486, 488-489; 493 NW2d 909 (1992), *aff'd*, 442 Mich 620; 502 MW2d 197 (1993); *Curry v Chrysler Corporation*, 1992 ACO No. 374, 1992 WL 674125, *1 (June 26, 1992) (Exhibit A); *Stevens v Valenite, Inc*, 2006 ACO No. 74, 2006 WL 1372510, *10 (May 9, 2006) (original emphasis) (Exhibit B) ("it was defendant's burden to produce proofs demonstrating its right to coordinate any particular funds"). In *Stevens v General Motors Co*, 2013 ACO No. 79, 2013 WL 3970830 (July 26, 2013) (Exhibit C), which addressed the propriety of GM's coordination formula,[4] the MCAC reiterated the "well established" rule that "[t]hat it is the defendant's burden to prove all elements of entitlement to coordination when that right is contested . . ." *Id* at *2 n 2 (citations omitted).

The MSIA incorrectly argues that *Franks v White Pine Copper Division,* 422 Mich 636; 375 NW2d 715 (1985) authorized GM's right to unilaterally reduce Arbuckle's workers' compensation benefits without Agency approval. At the outset, "*Franks* has been superseded by statute[,]" MCL 418.354(17). *Stozicki v Allied Paper Co., Inc*, 464 Mich 257, 261 n 4; 627 NW2d 293 (2001); see also 1987 PA 28; *Romein v General*

[4] In *Stevens*, the employee argued that "GM's method of coordination is impermissible because it deviates from the method of coordination outlined under Section 354 of the Act, and because it utilizes Social Security in determining the proper amount to be coordinated." *Id* at *2. Because GM failed to submit proofs and meet its burden of proof, the MCAC affirmed the magistrate's ruling disallowing the coordination. *Id* at *3.

Motors Corp, 168 Mich App 444; 425 NW2d 174 (1988), aff'd, 436 Mich 515, 462 NW2d 555 (1990).

Even if *Franks* remained good law, it is distinguishable and does not support the MSIA's argument. *Franks* did not involve a contested proceeding in the Workers' Compensation Agency. In *Manor, supra*, this Court specifically rejected the proposition that, once a contested proceeding is initiated, *Franks* continues to allow an employer to coordinate benefits without Agency approval:

> In [*Franks, supra*], we explained that an employer may so coordinate benefits without prior administrative approval. However, if a dispute, regarding coordination or other adjustment due to alternative payments, is taken to a so-called Rule V hearing (1984 AACS, R 408.35), the parties, by stipulation or through testimony and exhibits, need to present the magistrate with the information necessary to determine the question.

Id, 442 Mich at 623 n 4.

For this reason, the MCAC has consistently held that, in a contented proceeding before the Workers' Compensation Agency, the employer bears the burden of proving entitlement to, the propriety of, benefit coordination. In *Curry, supra*, the MCAC ruled that, once coordination is disputed in an Agency proceeding, *Franks* does not apply. The employer must meet its burden of proof before the Agency:

> Defendant's reliance on [Franks], which held that an employer or carrier does not need to acquire administrative approval prior to coordinating benefits, for the proposition that the employer or carrier does not carry the burden of proving a right to coordinate, is not appropriate. <u>When the right to coordinate is in dispute during a hearing, the defendant must prove that it provided a benefit subject to coordination and that the claimant received it</u>.

Id, 1992 WL 674125 at *1 (Exhibit A) (emphasis added).

In *Stevens v GM*, the MCAC rejected the same argument GM's amicus raises in this appeal – that MCL 418.354(10) required GM to only notify the Agency of the coordination:

> Defendant argues that pursuant to MCL 418.354(10) it only needs to submit "... proof of the basis for a credit or reduction." Defendant's argument is sufficient as far as it goes, but once the Agency or a party challenges the coordination the burden falls upon defendant to show how they arrived at the figures utilized.

Id, 2013 WL 3970830 at *3 (Exhibit C). The MCAC was unquestionably correct. The MSIA's argument, and reliance on *Franks*, ignores the second clause of MCL 418.354(10). Once Arbuckle filed his petition for a Rule V hearing, GM had the burden of proving that its coordination formula complies with MCL 418.354(11). GM has not met this burden.

B. MCL 418.354(11) undisputedly prohibits consideration of SSDI payments to coordinate workers compensation benefits.

MCL 418.354(11) undisputedly, and unambiguously, prohibits coordination of Arbuckle's workers' compensation benefits based, even in part, on SSDI payments he receives. Because Congress continues to mandate reduction of SSDI benefits based on the amount of workers' compensation payments, our Legislature clearly intended to protect disabled Michigan workers from enduring a compound reduction under MCL 418.354.

MCL 418.354(11) unambiguously prohibits consideration of SSDI benefits to coordinate workers' compensation benefits. It states:

> Disability insurance benefit payments under the social security act shall be considered to be payments from funds provided by the employer and to be primary payments on the employer's obligation under section 301(7) or (8), 351, or 835 as old-age benefit payments under the social security act are considered pursuant to this section. The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits. Any accrued social security disability benefits shall not be coordinated. <u>However, social security disability insurance benefits shall only be so considered if section 224 of the social security act, 42 USC 424a, is revised so that a reduction of social security disability insurance benefits is not made because of the receipt of worker's compensation benefits by the employee</u>.

Id (emphasis added). Applying the rules of statutory construction, set forth above, the underlined language in MCL 418.354(11) manifests the Legislature's unmistakable intent to permit consideration of SSDI benefits in coordinating workers' compensation benefits only if Congress revises the Social Security Act to eliminate the current reduction of social security benefits based on Michigan workers' compensation benefits the employee receives.

It is uncontested that Congress has not amended the Social Security Act, 42 USC § 424a, to eliminate the federally mandated reduction of SSDI benefits based on state workers' compensation payments. (See MSIA brief, p 7). 42 USC § 424a and 20 CFR § 404.408 still require reduction of social security disability benefits if the individual is also "entitled to a periodic benefit (including workers' compensation or any other payments based on a work relationship) on account of a total or partial disability." *Nicely v McBrayer, McGinnis, Leslie, & Kirkland*, 163 F3d 376 (CA 6, 1998), citing, in part, 20 CFR § 404.408(a)(2)(i). GM and the MSIA[5] accordingly concede that MCL 418.354(11) unambiguously prohibits consideration of SSDI payments to coordinate workers' compensation benefits. (GM application, pp 4, 9; MSIA brief, p 7).[6]

[5] The other GM amicus who has currently filed a brief, the MMA, expresses no position on whether GM's formula violates MCL 418.354(11).

[6] GM specifically admits that, "in accordance with the Legislature's stated intent, workers compensation payments may *not* be coordinated with benefits conferred under the federal Social Security Act." (GM application, p 4; original emphasis). With this, GM rejects the reasoning of district judge Rosen in *Garbinski v General Motors LLC*, unpublished opinion of the Eastern District of Michigan, issued March 30, 2012, 2012 WL 1079924, at *10 (No. 11–cv–11503) (GM Exhibit 9), that the prohibition in MCL 418.354(11) means only that GM may not reduce worker's compensation payments "by fifty percent of a retiree's social security disability payments." MCL 418.354(11) undisputedly precludes consideration of SSDI payments for any reduction of workers' compensation benefits.

C. GM's formula violates MCL 418.354(11) by taking into account Arbuckle's federal SSDI benefits in order to reduce his workers' compensation benefits.

GM and the MSIA's concession that MCL 418.354(11) unambiguously precludes coordination of Arbuckle's workers' compensation benefits with his federal SSDI payments establishes that the magistrate and MCAC erroneously upheld the formula. GM's attempt to channel its unauthorized use of Arbuckle's SSDI payments to reduce the workers' compensation benefits through the disability pension in no way excuses this violation of MCL 418.354(11). Agency Director Nolish saw through this ruse and correctly reaffirmed the Agency's February 25, 1995 award.

As demonstrated above, MCL 418.354(11) unambiguously provides that SSDI payments may be "so considered" for coordination of workers' compensation benefits only if Congress abolishes the current, federally-mandated reduction of SSDI under 42 USC § 424a (as regulated by 20 CFR § 404.408). MCL 418.354(1) is clear that "coordination" means to "reduce" benefits.

MCL 418.354(11) does not define the term "so considered." It is well established that, when a statute does not define a word, courts must use its ordinary and common meaning. MCL 8.3a; *Stanton v Battle Creek,* 466 Mich 611, 617; 647 NW2d 508 (2002). In such cases, it is appropriate to consult a dictionary. *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 522; 676 NW2d 207 (2004). Dictionaries commonly define the verb "consider," in pertinent part, to "take into account." See the Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/consider; Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/consider.

GM's formula unquestionably takes into account Arbuckle's SSDI benefits in reducing the February 25, 1995 workers' compensation award. The Letter of Agreement specifies that "workers' compensation payments for such employees shall be reduced by disability retirement benefits payable under the Hourly-Rate Employees Pension Plan to the extent that the combined workers' compensation payments, initial Social Security Disability Insurance Benefit Amount, and the initial disability retirement benefit (per week) exceed the employee's gross Average Weekly Wage at the time of the injury . . . ." (COA decision, p 2; emphasis added). The formula explicitly uses the "initial Social Security Disability Insurance Benefit Amount" as one of the three benchmarks to reduce Arbuckle's workers' compensation benefits. This directly violates MCL 418.354(11).

GM and the MSIA's argument – that the formula does not coordinate workers' compensation benefits with SSDI, but only with Arbuckle's disability pension benefits – is totally unavailing. The fact that the 2007 Letter of Agreement purports to reduce workers' compensation benefits based on "disability retirement benefits payable under the Hourly-Rate Employees Pension Plan" ignores the next clause, *i.e.*, the unambiguous operative language of the formula itself. The formula reduces workers' compensation benefits based on how much the "combination" of Arbuckle's workers' compensation payments, initial SSDI, and initial disability pension exceed his average weekly wage at the time of injury. This is not a coordination based solely on disability pension benefits.[7] This a coordination based, in part, on SSDI.

GM has not met its burden of proving that the coordination formula complies with MCL 418.354(11). The tortured logic of GM's own argument belies its contention that

[7] GM concedes that Arbuckle's disability pension benefits are a vested right. (GM reply brief, p 6 n 5). Accordingly, they may not be reduced.

the formula exclusively uses Arbuckle's disability pension to reduce workers' compensation benefits. GM claims that the formula complies "with Michigan law because it was not coordinating Arbuckle's Social Security Disability benefits against his workers' compensation benefits, but rather that GM included Arbuckle's Social Security Disability benefits as part of the overall cap calculation more specifically described in Section C." (GM application, p 9; emphasis added). If, as the formula expressly states and as GM concedes, SSDI benefits are "part of the overall cap calculation" used to reduce workers' compensation benefits, then this unquestionably violates MCL 418.354(11).[8]

> The argument of GM's amicus, the MSIA, is no less tortured:
>
> > Plaintiff's social security disability benefits are but an ingredient in the formula's calculation of how much – if any – disability pension payments may be coordinated. Mere mention of social security disability benefits in a formula does not mean such benefits were considered in the sense the words 'so considered' are used in Section 354(11)'s last sentence. (MSIA brief, p 8; emphasis added).

This is folly. Absolutely nothing in the unambiguous language of MCL 418.354(11) allows consideration of SSDI benefits to reduce workers' compensation benefits so long as they are not the sole basis, "but an ingredient" of the coordination formula.[9]

GM and the MSIA have failed to rebut Director Nolish's unassailable conclusion that the coordination formula violates MCL 418.354(11) by taking into account

[8] As indicated above, in 2007, GM and the UAW anticipated that this Court or the Court of Appeals might invalidate the coordination formula. (Arbuckle 4/27/15 brief, p 10 n 3).

[9] The MCAC, (GM Exhibit 8), and court in *Garbinski v General Motors LLC*, 521 F Appx 549, 558 (CA 6, 2013) (GM Exhibit 11), incorrectly accepted, as gospel, GM's argument that MCL 418.354(11) permits using the amount of SSDI benefits "to determine the amount of disability pension to coordinate." (MCAC opinion, p 6 – GM Exhibit 8). Nothing in MCL 418.354(11) authorizes this surreptitious approach. Moreover, the federal court's decision in *Garbinski* is not binding on this Court. *Abela v Gen Motors Corp,* 469 Mich 603, 607; 677 NW2d 325 (2004).

Arbuckle's federal SSDI benefits in order to reduce his workers' compensation benefits. The MCAC's decision must be reversed or this matter remanded to the Court of Appeals for consideration of compliance with MCL 418.354(11).

D. None of GM's policy arguments are meritorious or permit departure from the unambiguous language of MCL 418.354(11).

The policy arguments of GM and its amici are not only unfounded, but do not allow this Court to avoid the plain language of MCL 418.354(11). Policy concerns never justify rewriting or avoiding unambiguous statutes, but must instead be directed to the Legislature. See *Calovecchi v Michigan*, 461 Mich 616, 624; 611 NW2d 300 (2000) ("[P]olicy questions are properly directed toward the Legislature rather than to [the] Court. [The Court's] duty is to construe the text of the statute before [it], not to reach the policy result we judges think preferable."); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) (The Supreme Court will not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature."); see also *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994), quoting *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959) ("'The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere'").

GM and its amici remind this Court that the 2007 and 2009 Letters of Agreement were negotiated in the context of General Motors Corporation's bankruptcy. Whether or not there was an economic justification to amend General Motor's contractual obligations cannot, by itself, justify the formula's violation of MCL 418.354(11). Michigan law is clear that a contract provision which violations the law or public policy is

unenforceable. *Rory v Continental Ins Co,* 473 Mich 457, 470; 703 NW2d 23 (2005); see also *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003). Any consideration of the policies behind or context within which the 2007 and 2009 Letters of Agreement were negotiated is patently improper.

GM and its amici also argue that application of the formula has not prejudiced Mr. Arbuckle since his workers' compensation benefits have merely been restored to a level reflecting his average weekly wage when he was injured. Once again, this does not excuse the formula's violation of MCL 418.354(11). In addition, GM's argument fails to account for the fact that, pursuant to 42 USC § 424a and 20 CFR § 404.408(a)(2)(i), Arbuckle's SSDI benefits have already been reduced based on his workers' compensation payments. By including SSDI benefits as one of the "ingredient(s)" in the formula's coordination, (MSIA brief, p 8), GM is subjecting Arbuckle to a compounded benefit reduction.[10] Even more, as Mr. Arbuckle's application response explains, reduction of his workers' compensation benefits to 1991 levels ignores the impact of inflation.

Finally, the MAJ does not dispute GM's contention that the 2007 and 2009 Letters of Agreement could have memorialized a different workers' compensation benefit coordination formula that did not take into account the disabled employee's

[10] The unfairness to Mr. Arbuckle would be only magnified if this Court concludes that GM's formula complies with MCL 418.354(11). Any holding that GM's formula does not improperly consider SSDI in the coordination would either preclude Arbuckle from petitioning the Social Security Administration for a commensurate increase of his SSDI benefits (given his lower workers' compensation payments), or create an endless spiral where the Workers' Compensation Agency and federal government systematically fluctuate Arbuckle's benefits.

SSDI. The fact that GM[11] may ask the UAW to negotiate a new agreement which complies with MCL 418.354(11) in no way validates the 2007/2009 formula.

GM has failed to meet its burden of proving that its coordination of Arbuckle's workers' compensation benefits complies with MCL 418.354(11). The MAJ respectfully requests that GM's application be denied, the Court of Appeals' decision be affirmed on this basis, or that this issue be remanded to the Court of Appeals.

II. FEDERAL LAW DOES NOT PREEMPT THE REQUIREMENT THAT GM PROVE THAT COORDINATION OF ARBUCKLE'S WORKERS' COMPENSATION BENEFITS DOES NOT VIOLATE MCL 418.354(11).

Federal law did not preempt Arbuckle's workers' compensation claim or the requirement that GM prove its coordination of benefits complies with MCL 418.354(11). Preemption generally arises in one of three forms: express preemption, field preemption, or conflict preemption. *Cipollone v Liggett Group, Inc,* 505 US 504, 516; 112 SCt 2608; 120 LEd2d 407 (1992). Express preemption occurs only when Congress enacts legislation with a preemption clause, thereby explicitly declaring the preeminence of federal law in a given regulatory area. *Shaw v Delta Air Lines, Inc,* 463 US 85, 95–101; 103 SCt 2890; 77 LEd2d 490 (1983).

There is no federal law with a clause preempting a state statute, like MCL 418.354(11), precluding consideration of SSDI payments to coordinate workers' compensation benefits. Indeed, "[e]xpress preemption is not a possibility here because Congress has not enacted any law to give the federal government authority over state workers' compensation programs." *Siaperas v Montana State Compensation Ins Fund*,

[11] Which, after the government bailout, is now quite profitable.

480 F3d 1001, 1004 (CA 9, 2007). Express preemption therefore does not bar Arbuckle's claim or enforcement of MCL 418.354(11).

Field preemption is also inapplicable. Field preemption occurs when Congress creates a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room to supplement it . . ." *Pac Gas & Elec Co v State Energy Res Conservation & Dev Comm'n,* 461 US 190, 203–04; 103 SCt 1713; 75 LEd2d 752 (1983). To determine if Congress intended to occupy a field, courts must ascertain Congress' intent in enacting the federal law. *See Metro Life Ins Co v Massachusetts,* 471 US 724, 747–48; 105 SCt 2380; 85 LEd2d 728 (1985).

Michigan and federal courts have long held that, "absent a strong and compelling congressional mandate to preempt," "the fair and efficient administration of Michigan's workers' compensation system is of such local concern" that it is not preempted by federal law. *Hamlin v Michigan Seat Co*, 112 Mich App 84, 88; 314 NW2d 804 (1981), citing, in part, *San Diego Building Trades Council v Garmon*, 359 US 236, 244; 79 SCt 773; 3 LEd2d 775 (1959). In *Richardson v Belcher*, 404 US 78, 82; 92 SCt 254; 30 LEd2d 231 (1971), the US Supreme Court recognized that Congress did not intend to occupy the field, stating that if there is any overlap between a federal disability insurance program and a state workers' compensation program, "workmen's compensation programs should take precedence . . . ."

In *Scheuneman v General Motors Corporation*, 243 Mich App 210, 215-216; 622 NW2d 525 (2000), the Court of Appeals held that MCL 418.354 "is not preempted by ERISA." The court explained:

> First, § 354 does not alter the level of benefits that would be paid out under a given employee benefit plan from state to state. The coordination provisions in § 354 have no effect on the amount of benefits paid under the mutual pension. Rather, § 354 affects the amount of worker's

> compensation benefits paid to the employee. Second, plaintiff has not demonstrated that § 354 alters the terms of the pension plan. Finally, plaintiff has not demonstrated that § 354 subjects the fiduciaries of the pension plan to claims other than those provided in the ERISA.
>
> Because § 354 does not affect the administration of the mutual pension plan, but only affects the amount of worker's compensation benefits paid, which is traditionally an area of state authority, we conclude that any effect of § 354 on the pension plan is too tenuous and remote to warrant preemption.

Id (citation omitted).

Like ERISA, the LMRA, 29 USC §185, does not field-preempt Arbuckle's claim for workers' compensation benefit coordination, or GM's burden of proving compliance with MCL 418.354(11). In *Savage v General Motors*, unpublished opinion of the Eastern District of Michigan, issued September 10, 2011 (No. 10-12372) (Arbuckle Exhibit 1), Judge O'Meara held that a plaintiff's action alleging the right to worker's compensation benefits uncoordinated by social security benefits under MCL 418.354(11) was "not preempted" by the LMRA. (*Id*, pp 7-8). He explained that the LMRA does not preempt the claim regarding propriety of coordination because it did not arise under the CBA, but under MCL 418.354(11). (*Id*, p 5). There is no basis for federal field preemption in this matter.

Conflict preemption is equally inapplicable. Conflict preemption arises only "to the extent that (a state law) actually conflicts with federal law." *Gade v National Solid Wastes Mngnt Ass'n,* 505 US 88, 109; 112 SCt 2374, 2389; 120 LEd2d 73 (1992). A conflict occurs when compliance with both federal and state laws is impossible. *Siaperas, supra*, 480 F3d at 1005, citing *Fla Lime & Avocado Growers, Inc v Paul,* 373 US 132, 142–43; 83 SCt 1210; 10 LEd2d 248 (1963). Clearly, compliance with MCL 418.354(11) and the federal Social Security Act is not impossible. As indicated above, by its express language, the Michigan Legislature drafted MCL 418.354(11) to operate

in harmony with 42 USC § 424a. MCL 418.354(11) authorizes consideration of SSDI payments to reduce workers' compensation benefits only if Congress eliminates the current, workers' compensation-related reduction of SSDI payments. There is no conflict preemption.

GM has not raised any meritorious argument establishing that federal law, including the LMRA, preempts Arbuckle's objection to coordination under MCL 418.354(11). GM's attempt to avoid Judge O'Meara's analysis in *Savage, supra*, is misplaced. While *Savage* is a non-binding federal court decision, Judge O'Meara's reasoning adheres to long-standing Michigan and national law establishing that Michigan's workers' compensation statutes, particularly MCL 418.354(11), are not preempted. The MAJ is unaware of a single case holding that any federal law preempts a state statute prohibiting consideration of social security benefits to coordinate workers' compensation payments.

GM erroneously argues that the subsequent opinions in *Garbinski* invalidated Judge O'Meara's *Savage* decision. Judge Rosen's *Garbinski* opinion neither held, nor even suggested, that federal law preempted an argument/claim under MCL 418.354(11). *Garbinski I, supra*, at *8-*10 (GM Exhibit 9). Subsequently, the Sixth Circuit addressed the plaintiff's MCL 418.354(11) claim on the merits, without any mention of preemption. *Garbinski II, supra*, at *8 (GM Exhibit 11). Federal law does not preempt MCL 418.354(11), Arbuckle's objection to coordination of SSDI benefits, or GM's burden of proving compliance with the statute.

RELIEF REQUESTED

WHEREFORE, the MAJ respectfully requests that this Honorable Court either deny Appellant GM's application for leave to appeal, affirm the February 10, 2015 Court of Appeals decision, or remand to the Court of Appeals for consideration of the issue whether GM's workers' compensation benefit reduction formula violates MCL 418.354(11).

Respectfully submitted,

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Dated: February 17, 2016

INDEX OF EXHIBITS TO AMICUS CURIAE BRIEF
OF THE MICHIGAN ASSOCIATION FOR JUSTICE

Description	**Designation**
Curry v Chrysler Corporation, 1992 ACO No. 374, 1992 WL 674125 (June 26, 1992)	Exhibit A
Stevens v Valenite, Inc, 2006 ACO No. 74, 2006 WL 1372510 (May 9, 2006)	Exhibit B
Stevens v General Motors Co, 2013 ACO No. 79, 2013 WL 3970830 (July 26, 2013)	Exhibit C

Exhibit A

1992 WL 674125 (Mich.Work.Comp.App.Com.)

Workers' Compensation Appellate Commission

State of Michigan

END CURRY, PLAINTIFF,
VS.
CHRYSLER CORPORATION, SELF INSURED, DEFENDANT.
APPEAL FROM MAGISTRATE NOWINSKI

1992 Opinion No. 374
Docket No. 90-0802
June 26, 1992

***1** George A. Cassavaugh, Jr. for Plaintiff
Theodore A. Lughezzani and Susan B. Cope for Defendant

OPINION ON REVIEW

Skoppek,
Commissioner

Defendant appeals the decision of Magistrate David W. Nowinski, mailed September 13, 1990, granting an open award of compensation on a claim originally alleging “incurable insanity or imbecility, hernia, loss of industrial use of right leg, loss of industrial use of right hand and arm, chest, heart, respiratory system, systems and sequelae.” The magistrate made disability findings in connection with plaintiff's right wrist. Defendant argues that there was insufficient evidence to find a work-related disability, and that the magistrate erred in denying defendant's right to coordination of benefits. We affirm with modification.

There is competent, material, and substantial evidence on the whole record to support the work-related disability finding of the magistrate. MCL 418.861a(3). This includes the testimony of the plaintiff, whom the magistrate found credible. The magistrate could also reasonably infer expert medical support in the testimony of Dr. Donald Eugene Thompson.

Magistrate Nowinski denied defendant the right to coordinate disability benefits because of defendant's failure to provide specific information about the weekly amounts and time of such payments. The magistrate acknowledged that defendant had proven provision of such benefits, but denied the right to coordinate for failure to provide the specific information. In denying coordination for this reason, the magistrate erred in this case.

The magistrate was correct in noting that the defendant has the burden of proving the right to coordination. Defendant's reliance on Franks v White Pine Copper Division, 422 Mich 63 (1985), which held that an employer or carrier does not need to acquire administrative approval prior to coordinating benefits, for the proposition that the employer or carrier does not carry the burden of proving a right to coordinate, is not appropriate. When the right to coordinate is in dispute during a hearing, the defendant must prove that it provided a benefit subject to coordination and that the claimant received it. However, in this case, the defendant met that burden of proof, and the provision of disability benefits was, in fact, not in dispute.

Defendant presented proof that it paid disability benefits. Plaintiff admitted the receipt of Sickness and Accident benefits and Extended Disability Benefits provided by his employer. There was, therefore, no dispute about defendant's provision and plaintiff's receipt of benefits subject to coordination of benefits under MCL 418.354.

Plaintiff's request for specific information about the precise amounts of benefit payments and the dates for such payments was just that: a request for information. Plaintiff was not disputing the amounts, or their source, or whether defendant in fact provided them. The magistrate had the authority to order defendant to provide the requested information to plaintiff upon a finding of workers' compensation liability, and he could have suspended the right to coordinate until defendant provided the information, but that magistrate had no authority to permanently deny the right to coordination, merely because defendant was unable to satisfy plaintiff's request for information on the specific date designated by the magistrate, prior to the magistrate even making a determination of liability.

***2** Defendant met the burden of proving the provision of benefits subject to coordination under MCL 418.354. The provision of such benefits was, in fact, not in dispute. The magistrate, therefore, erred by refusing to order coordination of those benefits. The decision of the magistrate is modified to permit the coordination of these benefits.

Commissioner Wyszynski concurs.
Commissioner Goolsby concurs in result.

Dated and entered at Lansing, Michigan, this 26th day of June, 1992;

WORKERS' COMPENSATION APPELLATE COMMISSION

Jürgen Skoppek
James Edward Wyszynski, Jr.
Commissioners

ORDER

This cause having come before the Appellate Commission on appeal by defendant from the decision, mailed September 13, 1990, of Magistrate David W. Nowinski, granting an open award of compensation benefits to plaintiff; after due consideration of the evidence taken and the briefs of counsel, and the undersigned Commissioners having determined that the decision of the magistrate should be affirmed with modification, NOW, THEREFORE,

IT IS ORDERED, That the decision of the magistrate is modified to permit coordination pursuant to MCL 418.354 of the Sickness and Accident Benefits and Extended Disability Benefits provided to plaintiff by defendant. In all respects not inconsistent with this modification, the decision of the magistrate is affirmed.

Dated and entered at Lansing, Michigan, this 26th day of June, 1992;

WORKERS' COMPENSATION APPELLATE COMMISSION

Jürgen Skoppek
James Edward Wyszynski, Jr.
Garry Goolsby
Commissioners

1992 WL 674125 (Mich.Work.Comp.App.Com.)

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Exhibit B

2006 WL 1372510 (Mich.Work.Comp.App.Com.)

Workers' Compensation Appellate Commission

State of Michigan

DAVID STEVENS, SR., PLAINTIFF
v.
VALENITE, INCORPORATED AND CONTINENTAL CASUALTY COMPANY; SILICOSIS, DUST DISEASE AND LOGGING INDUSTRY COMPENSATION FUND, DEFENDANTS

APPEAL FROM MAGISTRATE PAIGE.

2006 ACO No. 74
Docket No. 05-0033
May 9, 2006

***1** Michael P. Krut and Daryl Royal for Plaintiff
Timothy J. Mullins for Defendants Valenite, Incorporated and Continental Casualty Company
Dennis J. Raterink for Defendant Silicosis, Dust Disease and Logging Industry Compensation Fund

OPINION

Will, Commissioner, Controlling

This claim was heard by former Magistrate Paige on several dates beginning December 16, 2003 through June 24, 2004. Plaintiff and several of his former coworkers testified on behalf of plaintiff. Joseph Saylor, defendant-employer's human resource manager, testified for defendant-employer.

Harvey W. Organek, M.D., plaintiff's treating physician who is board certified in pulmonary medicine, sleep disorders and internal medicine, testified for plaintiff at a deposition held on June 18, 2003. Thomas Petz, M.D., who examined plaintiff on behalf of the employer testified for the employer at a deposition held on July 14, 2003. Dr. Petz is board certified in pulmonary medicine. Joel C. Seidman, M.D., board certified in internal medicine and pulmonary diseases, testified for the Silicosis, Dust Disease and Logging Industry Compensation Fund at a deposition held on July 8, 2003. Dr. Seidman had examined plaintiff at the request of the Fund. Victor Gordon, D.O., who examined plaintiff at the request of the Fund, testified for the Fund at a deposition held on September 9, 2003.

On December 28, 2004, the magistrate's decision was mailed. She gave plaintiff an open award. Beginning on page 5 of her decision and ending on page 27 thereof the magistrate has accurately summarized the evidence presented. Accordingly, pursuant to MCL 418.861a(10), we adopt her summary as our own.

Having summarized the evidence presented the magistrate made her findings of fact which included the following:
1. Whether a personal injury arose out of and in the course of plaintiff's employment, and whether the plaintiff's disability, if any, was due to the alleged injuries of January 18, 2002, under MCL 418.301(1)(4).

The medical records clearly support the plaintiff's diagnosis of silicosis and/or asbestosis. Plaintiff's CAT scan was found to be classic for silicosis and showed that plaintiff had silicosis and asbestos pleural disease. Plaintiff's chest x-rays were compatible with pneumoconiosis. Dr Organek testified that plaintiff's restrictive airway defect was "clearly on the basis of his pneumoconiosis that is occupationally related and induced". The doctor felt that the objective testing

and plaintiff's clinical picture was "very consistent" with silica exposure. I did not find the fact that plaintiff might have had a positive TB skin test in the past to be relevant. Chest x-rays did not detect any TB present in the lungs. It is not uncommon to have a false positive skin test. There was adequate medical support to establish that plaintiff's current respiratory condition was medically distinguishable from the preexisting non-work-related asthmatic and hay fever conditions, emphysema, and/or bronchitis that he may have had in the past under *Rakestraw v General Dynamics Land Sys, Inc.*, 469 Mich 220, 666 NW2d 199, 17 MIWCLR 177 (2003).

***2 When Dr. Organek, originally examined plaintiff, prior to his last date of work, the plaintiff was not aware or did not associate his breathing difficulties with exposure to either asbestos or silica. It is reasonable that a non-medical person would not see the correlation between substances he came in contact at work and his physical symptoms. Testimony provided by witnesses, who also worked for Valenite, established that there was asbestos used in the plant. Gloves made of asbestos were used to remove hot parts from the furnaces. These gloves would become frayed yet they were used until they reached a point that the employees would burn their hands, as the gloves frayed the particles would become airborne. Asbestos was also used on the elbows of overhead pipes for insulation. Patrick Gleason testified that prior to 1993 he would make cooling jackets with powder asbestos, which was made into a paste. The asbestos powder was tossed around and mixed by hand. The powder would become air borne. The process was done in an area where other employees would be exposed. Whether or not the plaintiff was aware of the exposure and whether he gave a history of this exposure is simply not relevant. There was ample opportunity for the plaintiff to be exposed to and suffer from the consequences of both asbestos and silica. The plant may have had sophisticated air handling equipment in 2002 but as plaintiff worked for the company for thirty-seven years he would have worked in a different atmosphere in 1964. I found Dr. Organek's testimony to be reasonably based on documented objective findings. Dr. Organek was in the best position to make a valid diagnosis and correlation as to the cause, and I found his testimony to be the most reliable. Dr. Organek found the plaintiff to have pneumoconiosis. Plaintiff at times had clear lungs with no respiratory compromise, these periods of remission have occurred while plaintiff was off work, no longer exposed to noxious substances and using inhalers to keep his lungs clear.**

Dr. Petz, defendants['] examining doctor saw the plaintiff on only one occasion. The doctor was not aware that plaintiff had been exposed to either silica and/or asbestos. The original diagnosis rendered by Dr. Petz did not contain any reference to plaintiff having either asbestosis or silicosis. The doctor made great attempts to discount the medical documentation, which supported plaintiff's position. I did not find his testimony to be reliable. There is no doubt that smoking is harmful to the lungs and that plaintiff's history of smoking did not help his lung pathology, however, plaintiff's lung changes according to Dr. Organek, were not caused by the smoking.

Dr. Seidman, who examined the plaintiff on behalf of the Dust Fund, similarly was not given a history of exposure to asbestos presumably because at the time of his examination plaintiff was unaware that he had been exposed to the substance over the many years of his employment. The doctor wrote: "Not withstanding right-sided calcific pleural thickening, the plaintiff's history was inconsistent with substantial occupational asbestos inhalations. The doctor reviewed plaintiff's diagnostic testing and found that the x-rays showed pleural thickening which the doctor admitted could be inferred to be consistent with among other things a significant occupational asbestos exposure. The doctor also noted that there were also some findings that he considered pretty minor that might be consistent with one of a variety of pneumoconiosis. Had the doctor been given a complete history his opinion may have been even more supportive.

***3 Dr. Seidman testified that exposure of silicosis from a grinding wheel, even for a relatively short period of time, in a susceptible person might be enough to produce hard metal disease. "A causual [sic] exposure to asbestos for a very short time, for a day in an adequately contaminated environment could predispose someone to lung cancer, bronchogenic carcinoma for the rest of their lives". Thirty-seven years of exposure would be sufficient to produce pneumoconiosis.**

Dr. Organek found plaintiff to be unable to return to work in any capacity. Dr. Petz found plaintiff able to return to work in any capacity, which was questionable as plaintiff's oxygen saturation level was 92% on clean room air while at

rest, when the doctor examined him. A 92% oxygen level would be a valid objective reason for plaintiff's complaints of shortness of breath; I question the validity of the doctor's testimony, as with exertion in a less than clean environment, the oxygen level would decrease. Dr. Seidman thought anyone who had significant and probably to a great extent irreversible lung disease, such as plaintiff, should not work in an industrial contaminated environment. I found Dr. Seidman's and Dr. Organek's testimony to be the most pervasive. Plaintiff testified that he has sought work since leaving Valenite but felt his medical condition prevented him from being hired. I found plaintiff to be credible.

I find that, because of his work injury plaintiff can no longer perform the work he is qualified and trained to do, i.e. (soft grinding). The work that plaintiff is qualified and trained to do is always done in an industrial setting, plaintiff's breathing difficulties preclude him from working in such an environment. Plaintiff has thus established a limitation in his wage earning capacity in work suitable to his qualifications and training and is entitled to continuing wage-loss benefits. MCL 418.301(4).

Plaintiff had worked for the defendant doing soft grinding work; he had no other transferable skills. Plaintiff's medical condition along with the prognosis that his pneumoncosis could lead into lung cancer would preclude him from seeking employment in any field for which he has education and training. There was no evidence presented to suggest that there were other jobs that plaintiff could do within his education and training, and within his restrictions, that would earn the same wages that he was earning while he worked at Valenite.

*** * ***

The fact that plaintiff was able to maintain a perfect work attendance record up through his last day of work was not conclusive that he did not experience respiratory difficulties and/or was not suffering from respiratory distress. Plaintiff sought treatment for his lung pathology on December 16, 2001, approximately a month prior to his last day of work. It would call for speculation as to whether plaintiff sought treatment in light of the impending plant closing or whether the plaintiff would have been able to continue work after January 18, 2002, in light of his ever-increasing symptoms.

***4 Plaintiff was required to sustain his burden of proof by a preponderance of the evidence. See MCL 418.851; MSA 17.237(851). The Supreme Court interpreted the legal standard in *Aquilina v General Motors Corp*, 403 Mich 206, 211-212 (1978)**.
The plaintiff must establish a continuing work-related disability by a preponderance of the evidence in order to qualify for continuing benefits.

Based upon all the testimony and evidence presented in this matter[,] I find as fact that plaintiff has established by a preponderance of the evidence that he sustained a work-related injury in the nature of respiratory and lung pathology. In reaching this conclusion, I relied upon the following reasoning.

Valenite like most employers exposed plaintiff to both asbestos and silica not because they were necessarily negligent but more likely because as a whole, we as a society simply weren't aware of the long-term sideffects. Not only is plaintiff currently suffering from respiratory difficulties but also he is at risk for developing lung cancer in the future. I find that plaintiff has a disabling lung condition that was caused and/or significantly aggravated by his employment with Valenite. [Magistrate's decision, pp 22-24, 25.]

On January 25, 2005 the defendants, employer and carrier, filed a claim for review. On January 26, 2005, the defendant Fund filed a claim for review.

On May 9, 2005, defendants employer and carrier filed their brief on appeal raising three issues:

I. THERE IS NO COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF A WORK-RELATED DISABILITY.

II. ASSUMING ARGUENDO THAT PLAINTIFF SUFFERS FROM A WORK-RELATED CONDITION, THE MAGISTRATE'S FINDING THAT CLAIMANT SUFFERS FROM SILICOSIS AND ASBESTOSIS WAS SUPPORTED BY THE COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE.

III. THERE IS COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE TO SUPPORT THE COORDINATION OF ALL BENEFITS RECEIVED.

The defendants employer and carrier contend in their first argument that plaintiff's own testimony and that of his treating physician standing alone would compel a conclusion that plaintiff does not suffer from a disabling lung condition.

In this connection, the defendants have argued that, while pursuant to MCL 418.301 that plaintiff's last day of work with the employer when the plant closed could be labeled a date of injury, that such does not mean that plaintiff is disabled at that time. *Monti v Burroughs Corp*, 398 Mich 494 (1976).

In this connection the defendants also argued:
It goes virtually without saying that an employee who does not miss so much as one minute of work during his last year of employment can hardly be considered to be disabled from performing his normal job duties. Additional testimony provided by the Plaintiff and co-workers he called on his own behalf, as well as that of the employer, indicated that not only was Plaintiff continuously present for work, but that he was a highly skilled expert machine operator who performed his duties as well or better than any of his co-workers, again denying any inability on Plaintiff's part to perform his normal employment duties. In addition to working without interruption through the time the plant closed, Plaintiff testified that in addition to exhausting his wage continuation benefits and collecting unemployment benefits, which in and of itself requires an assertion of his continuing ability to work, Plaintiff accepted distributions of his retirement benefits accrued as a result of his former employment, thereby triggering the presumption against disability contained in the worker's compensation statute at 418.373, which provides in part:
***5 "(1) An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 139f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4." (MCLA 418.373(1))**

*** * ***

The foregoing establishes a consistent body of medical evidence over which there is no real dispute. None of the three doctors who have testified in this case find a disabling silicosis or asbestosis as is claimed by the Plaintiff. At best Dr. Organek placed claimant on prophylactic restrictions of no exposure to a dusty or dirty environment.

Finally, and of further interest is the fact that Plaintiff and his former co-worker, Claude Thomas, testified and confirmed that Plaintiff is an expert lathe, bridgeport, cut-off saw, band saw and grinder machine operator. On examination, Plaintiff and his co-worker confirmed that Plaintiff was expert in operating all of the various machinery used in tool and die type manufacturing. As such, even though Plaintiff's particular place of employment closed as a result of business reasons, it is clear that Plaintiff is fully employable as a machine operator in any of the hundreds of tool and die shops located throughout the Detroit area which employ individuals skilled in the operation of metal forming machinery, such as the Plaintiff.

The Magistrate's decision should be reversed not only on the basis that plaintiff has no work-related disabling lung disease, but for the further reason that he worked continuously up until the plant closed, at which time he retired. Plaintiff obviously continues to have a wage earning capacity which is undiminished. There is no suggestion whatsoever that the Plaintiff is unemployable in the vast majority of jobs in the tool and die industry at large, as in the more typical situation, the Plaintiff would be working with aluminum or steel components performing the same type of machining operations. As a result, under the dictates of Sington v Chrysler Corporation, 467 Mich 144; 648 NW2d 624 (2002), Plaintiff retains an undiminished wage earning capacity as a machine operator, and is fully employable as such had he not chosen to retire. For all of these reasons, the magistrate's decision should be reversed and benefits denied. [Defendants' brief, pp 10-11, 19-20.]

Before turning to plaintiff's response to the above, we reject defendants' argument that MCL 418.373(1) is applicable to this case because this claim involves a situation where the plant closed. Further, plaintiff did not leave active employment. As a matter of fact, plaintiff continued to seek work within his physical capability.

***6** Plaintiff filed his brief in response to defendants' appeal on August 25, 2005. In that brief, plaintiff argued that he has established that he has a work-related disability. His argument in this regard included the following:
The magistrate's conclusion is also supported by plaintiff's own testimony that he was significantly compromised by his pulmonary problems ...
"I can't mow my yard because I get too short of breath. I tried shoveling snow. I shoveled one section of snow. I had to stop. I couldn't breathe. I'd walk half a block. I'm coughing like mad, and pretty soon I have to cough that phlegm up." (II 92)

"I'm short of breath now. I breathe real shallow. I get breath in but I don't get it out. I run out of breath so quick." (II 102)

... **and that he had been unable to find work with his physical problems, despite attempts to get a new job**:
"**Q You haven't worked anywhere since—**

"**A No, I haven't**.

"**Q —you left Valenite; have you applied for any jobs**?

"**A Yes, I have**.

"**Q And what types of jobs have you applied for**?

"**A I applied for anything I could get. I was—went to a place for machine—machine shops. I even went to a place that builds— does cars and stuff, and when they find out my breathing or my hearing's bad—" (II 109)**

This all adds up to a clear picture of disability, as the magistrate found. MCL 418.861a(3).

Defendant contends that such a finding is impossible, because plaintiff was able to work through his last day of work without missing time. The magistrate properly dealt with that situation, however, writing:
"The fact that plaintiff was able to maintain a perfect work attendance record up through his last day of work was not conclusive that he did not experience respiratory difficulties and/or was not suffering from respiratory distress. Plaintiff sought treatment for his lung pathology on December 16, 2001, approximately a month prior to his last day of work. It would call for speculation as to whether plaintiff sought treatment in light of the impending plant closing or whether

the plaintiff would have been able to continue work after January 18, 2002, in light of his ever-increasing symptoms." Magistrate's Opinion, at 25.

This is also appropriate, in that plaintiff did indeed seek treatment with first his primary internist, and later on was referred to Dr. Organek whom he first saw on December 16, 2001 (O 6). Furthermore, plaintiff testified that he had experienced progressively worsening symptoms over the final five years of his tenure with defendant (II 87-88).

Additionally, defendant fails to acknowledge the nature of Dr. Organek's opinions, adopted by the magistrate. The doctor did not state that plaintiff was physically unable to perform his former job duties, but instead effectively stated that it was medically inadvisable that he continue to do so (O 56-58). While a claimant may be able to physically do his job, he may not be forced to go on if doing so would further damage his health.

***7 Pursuant to the doctrine of "medical inadvisability," a claimant need not return to work even if her initial work-related problems have subsided, provided (a) such a return would cause new problems and (b) the condition that creates the inadvisability is either caused or aggravated by the employment. This was the Court of Appeals' holding in Thomas v Chrysler Corp, 164 Mich App 549, 554-555; 418 NW2d 96 (1987)**:

> "**Although the WCAB determined that plaintiff was not entitled to compensation notwithstanding the medical inadvisability of returning to work, it did not apply improper legal standards, for the question whether it was medically advisable for plaintiff to return to work is not relevant until it is established that the disability was caused or advanced by the work. That it is inadvisable for plaintiff to return to work at Chrysler does not entitle him to benefits unless he has suffered a compensable injury. Kostamo v Marquette Iron Mining Co, 405 Mich 105, 116; 274 NW2d 411 (1979)**."

See, also, Burnett v General Motors Corp, 1997 ACO # 697.

Since plaintiff's condition would be further aggravated by exposure to industrial conditions, and because this is the only type of work suitable to his qualifications and training, plaintiff is disabled. The magistrate correctly so held, and her opinion should be affirmed accordingly. [Plaintiff's brief on appeal, pp 8-10.]

In this connection it is noted that the magistrate found the testimony of plaintiff and of Dr. Organek to be credible. Plaintiff's unsuccessful attempts to locate employment notwithstanding, his pulmonary status demonstrates that he is not avoiding work even if such work would be medically inadvisable.

Under these circumstances we believe that plaintiff had a compensable disability pursuant to *Sington v Chrysler Corp*, 467 Mich 144 (2002). Our colleague does not address any of the issues raised by defendant, but rather raises its own issue of "due process" and would remand on that basis.

We often see arguments which intermingle sections 301(4), 319 and 301(5)(a). It is important to sort out the relevant evidence for each section separately.

Section 301(4) states as follows:
(4) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

The Michigan Supreme Court in *Sington* explained its overruling of *Haske v Transport Leasing, Inc*, 455 Mich 628 (1997), as it pertains to disability and the language of 301(4) as follows:

As this language plainly expresses, a "disability" is, in relevant part, a limitation in "wage earning capacity" in work suitable to an employee's qualifications and training. The pertinent definition of "capacity" in a common dictionary is "maximum output or producing ability." *Webster's New World Dictionary* (3d College ed). Accordingly, the plain language of M.C.L. § 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training.

***8 So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability**.

* * *

If the employee is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications, a disability has been established under § 301(4).

* * *

Apparently, the concern of the *Haske* majority was that there would be no distinction between "wage loss" and "disability" if a showing of disability required an overall limitation in "wage earning capacity" in all work suitable to an employee's qualifications and training. That is, the *Haske* majority was concerned that reading the first sentence in accordance with its plain meaning would render the second sentence nugatory.

However, we do not believe that this concern was justified. As an initial matter, the focus of the inquiry is not on every single job suitable to an employee's qualifications and training—only those that produce the maximum income. *Sington v Chrysler Corp*, 467 Mich 144 (2002).

The Court has made it clear that a finding of disability (the so called *Sington* analysis) is determined looking only at the jobs suitable to qualifications and training which pay the maximum wages. The statute directs that we look only at the qualifications and training at the time of the work-related injury. [1] While we disagree with the magistrate that the only job suitable to plaintiff's qualifications and training was that of an RN, because she was also trained and had performed as a nursing assistant, such disagreement does not change the outcome. Plaintiff is no longer able to perform the work that paid the maximum wages. The magistrate properly found that she is disabled within the meaning of the Act and consistent with *Sington*.

In a recent *en banc* case, *Stokes v DaimlerChrysler*, 2006 ACO # 24, a majority of this Commission held that the term "qualifications and training" as used in section 301(4) does not refer to transferable skills, but rather to characteristics of jobs an employee has held and training an employee has undergone. The burden remains, as it always has, with plaintiff, to show that, as a result of her work injury, she is no longer able to perform any of the jobs that pay the maximum wages and that are available to her. *Stokes* further held that, while it is advisable for a plaintiff to look for work, it is not a requirement under the Act. While the majority would have "wage earning capacity" and "wage loss" intertwined, *Sington* affirmed that they are not. "Qualifications and training" refers to "wage earning capacity" and "disability". Nowhere in the Act can one find a tie between "qualifications and training" and wage loss.

9** Our colleague states that as a part of establishing a compensable disability, plaintiff must establish that a work-related injury precludes him from performing ***all jobs within his qualifications and training, citing a 2003 Commission decision. *Stokes* was issued, in part, to negate reliance on such prior opinions. The above cited position is absolutely contrary to the clear language of *Sington*.

We acknowledge the majority's concern for due process rights. However, we fail to see where defendant was in any way prejudiced by our recent decision in *Stokes*. This opinion clearly indicates that the magistrate's *Sington* analysis would have been proper even if *Stokes* had never been issued. There has been no request by any party for a remand. While remand may be appropriate in some circumstances, without request by an interested party, we do not find this to be one such circumstance. The magistrate decided the issue without reference to *Stokes*, and the "easier burden" that the majority asserts.

Defendants' second argument that assuming plaintiff has a work-related disability that such disability would be silicosis and/or asbestosis is no longer an issue because the Silicosis, Dust Disease and Logging Industry Compensation Fund filed a brief on July 21, 2005 adopting and supporting the arguments presented in the employer and carrier's brief on appeal. Thus the employer and the carrier are eligible for reimbursement of benefits paid pursuant to the statute.

In defendants' third and final argument, they claim that they are entitled to coordinate all benefits received by plaintiff:
In the instant case, at the time the plant closed, plaintiff received substantial amounts of money. Plaintiff testified subsequent to his last day worked of receiving 35 payments in the amount of $410.00 a week before taxes (T II 40). He also received a payout of his 401K (T I 46). He also got a buyout (T I 79) and received approximately $10,000.00 in October of 2003. With the employer contributing a percentage of plaintiff's wages plus the company would match up to 6% of the employee's contribution. In 1993 the company's contribution was 4% plus the match. Plaintiff also received unemployment benefits. The magistrate commented on monies claimant received. She stated:
"Plaintiff worked up to the last day prior to the plant closing. When he was terminated he received one half of his pay, $410.00 per week for thirty-five weeks. Plaintiff also received cash for his 401k." (Magistrate's Op pg 7)

* * *

"When plaintiff's employment was terminated he had to take a pay out of his 401k." (Magistrate's Op pg 8)

* * *

"Exhibit # 3 was explained. Plaintiff received separation pay of $6,888.00 for 336 hours at his hourly rate. Plaintiff also received $14,350.00 calculated at $410.00 per week.

The company's 401k was figured at three percent of plaintiff's wages plus the company would match up to six percent of the employee's contribution. In 1993 the company's contribution was four percent plus the match." (Magistrate's Op pg 13)

* * *

***10 "Plaintiff received his final check on February 3, 2002. He received ... pay for two hundred fifty-three banked vacation hours and twelve earned vacation hours. Three hundred thirty-six hours of separation pay. The hours were calculated at a rate of $20.50 per hour. The gross amount received was $12,320.50**.

* * *

"Plaintiff received $410.00 supplemental separation allowance on October 6, 2002." (Magistrate's Op pg 21)

The magistrate held:
IT IS HEREBY ORDERED that the defendant may receive credit for any compensation benefits or wages, which they have previously paid and/or any unemployment benefits that may be received." (Magistrate's Op pg 27)

Pursuant to section 354 of the Worker's Disability Compensation Act, defendant is entitled to appropriate coordination of these amounts and to reduce plaintiff's benefits. Defendant's [sic] seek this pursuant to Drouillard v Stroh Brewery Co, 448 Mich 293 [sic]; 536 NW2[d] 530 (1995); Corbett v Plymouth Township, 453 Mich 522; 556 NW2d 478 (1996); Rangel v Ralston Purina Co, 248 Mich App 128; 538 NW2d 187 (2001). [Defendants' brief, pp 24-25.]

Plaintiff argued that the magistrate's decision pertaining to coordination must be affirmed. In this connection plaintiff asserted: **Defendant argues that "there is competent, material and substantial evidence to support the coordination of all benefits received." Defendant's Brief, at 24 (capitalization removed). This is not an appropriate issue at this juncture in the proceedings**.

The magistrate's opinion provides only for credit "for any compensation benefits or wages, which they have previously paid and/ or any unemployment benefits that may have been received." Magistrate's Opinion, at 27. There is no additional language permitting coordination of separation pay, a 401k distribution, or a buyout.

The "competent, material and substantial evidence" standard applies only to a finding actually made by a magistrate. MCL 418.861a(3). It does not apply to a finding not made or rejected.

In that regard, it was defendant's burden to produce proofs demonstrating its right to coordinate any particular funds. **Krastes v Haseley Construction Co, Inc, 2004 ACO # 119. However, it clearly failed to do so with regard to any of the funds in question**.

The record indicates that the separation pay received by plaintiff was computed based solely upon the length of plaintiff's service for defendant (IV 69-71). There is no additional suggestion in the record that this payment was intended to compensate plaintiff for lost wages in the future. As a result, the separate pay is not subject to coordination, as a matter of law. Rangel v Ralston Purina Co, 248 Mich App 128; 638 NW2d 187 (2001). There is similarly no such proof with regard to the buyout, and certainly no indication that it was made in any way to reflect compensation for future wage loss. As a result, this payment is not coordinateable either. Id.

***11 While the 401k distribution might conceivably have been subject to coordination, there is no proof as to the true nature of this benefits [sic]. The statute refers only to pension or payments made "to a qualified profit sharing plan under section 401(a) of the internal revenue code" or a successor to that provision. MCL 418.354(1)(f). There is no proof that the benefit paid in this case fits within these parameters, and therefore no proof that this benefit is subject to coordination**.

Additionally, there is simply no way provided on this record to determine which portion of said payment resulted from defendant's contributions, and which resulted from plaintiff's own contributions. However, the coordination statute requires such a differentiation. **Id.**

As a result, there is simply no record proof that any payments made here are subject to coordination, and the magistrate properly did not order it. [Plaintiff's brief, pp 11-12.]

The magistrate correctly ordered that the unemployment compensation and wages received by plaintiff are to be credited against plaintiff's entitlement to weekly benefits.

We do not believe that the other benefits paid by the employer that it claims the right to coordinate are coordinateable because there is no showing by the employer that MCL 418.354 covers these benefits. Such is true because the proofs necessary to establish these benefits as coordinateable are peculiarly within the knowledge of the defendant employer and the employer did not offer the necessary proofs. *Krastes v Haseley Construction Co*, 2004 ACO # 119.

In *Brown v Beckwith Evans Co*, 192 Mich App 158 (1991), the Court of Appeals held that the burden for application of MCL 418.373, the retiree presumption is on the defendant. By analogy, this Commission has held that the burden is on the defendant to establish the applicability of MCL 418.354, coordination of benefits. In this connection, see *Scheuneman v General Motors Corp* 1995 ACO # 356 and *Hutcherson v Detroit Board of Education*, 1999 ACO # 606.

The reason for this rule is obvious and the instant case demonstrates the wisdom thereof. The defendants have certain information that is within their peculiar knowledge to properly coordinate plaintiff's 410K. Specifically, the defendants have knowledge of or special access to the ratio of contributions made by plaintiff as opposed to defendants so that the proper amount can be coordinated.

Further, Section 354 refers only to pension or payments made to a qualified profit sharing plan under Section 401(a) of the internal revenue code. Here the defendants presented no proof that the benefits paid in this case fit within these guidelines. Lacking these essential proofs within the peculiar knowledge of defendants, coordination is not appropriate.

Insofar as the separation pay is concerned, as pointed out by plaintiff, there was no showing by defendants that it was intended to compensate plaintiff for lost wages in the future. Instead the separation pay was computed solely based upon plaintiff's years of service for the defendant-employer. Accordingly, it is not subject to coordination pursuant to *Rangel v Ralston-Purina Co*, 248 Mich App 128 (2001).

***12** The decision of the magistrate is affirmed.

Chairperson Glaser Concurs

Rodger G. Will
Commissioner
Martha M. Glaser
Chairperson
Przybylo, Commissioner, Dissenting

I respectfully dissent because we cannot conclude that plaintiff satisfied his burden of proving disability under the *Stokes* decision without allowing defendants the opportunity to present proofs related to jobs suitable to plaintiff's qualifications and training.

We have issued an opinion that significantly conflicts with our previous decisions that applied the *Sington v Chrysler Corp*, 467 Mich 144 (2002), definition of disability. Interpreting the definition of disability from MCL 418.301(4), the Michigan Supreme Court reversed prior decisions in *Sington*. Responding to *Sington*, the Appellate Commission issued numerous decisions explaining its understanding of plaintiff's burden to prove disability and wage loss. However, in *Stokes v DaimlerChrysler Corp*, 2006 ACO # 24, the Appellate Commission issued an *en banc* decision reversing its position on plaintiff's burden of proof and altering its view of wage loss. Because the parties could not anticipate their new obligations under *Stokes*, due process protections require remand to allow a fair opportunity to present proofs to satisfy their burdens.

As we have repeated in countless cases, and again in the *Stokes* decision, the Michigan Supreme Court overruled *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997) redefining disability in their recently decided case of *Sington v Daimler Chrysler Corp*, 467 Mich 144 (2002). *Sington* has redefined disability as follows:
Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage-earning ability in work suitable to that person's qualifications and training.

So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability.

* * *

If the employee is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications, a disability has been established under § 301(4).

* * *

[R]ather than concluding that any employee who is unable to perform a single job because of a work-related injury has a "disability" § 301(4), a worker's compensation magistrate or the WCAC should consider whether the injury has actually resulted in a loss of wage-earning capacity in work suitable to the employee's training and qualifications in the ordinary job market.

In sum, we conclude, ... that "disability" as defined in MCL 418.301(4) cannot plausibly be read as describing an employee who is unable to perform one particular job because of a work-related injury, but who suffers no reduction in wage-earning capacity.

* * *

***13 The plain meaning of the definition of "disability" in § 301(4) as a "limitation of an employee's wage-earning capacity in work suitable to his qualifications and training" precludes regarding a person as disabled when an inability to perform one particular job does not, in fact, reduce that person's wage-earning capacity in other, equally well-paying work suitable to his qualifications and training. Section 301(4) specifically directs the reader to a consideration of whether there is a limitation in wage-earning capacity, not of whether a person is merely limited in performing one (or more) particular jobs**.

As the Supreme Court explained in *Sington*, it is entirely possible to suffer a work-related injury, however not suffer a compensable disability. The two are not interchangeable. As part of establishing a compensable disability, the plaintiff must

establish that a work-related injury precludes him from performing all jobs within his or her qualifications and training. *Carpenter v Snack Time Services, Inc*, 2003 ACO # 103.

In *Kethman v Lear Seating*, 2003 ACO # 205, the Commission required a claimant to prove a work-related medical impairment, qualifications and training, and finally, a limitation in maximum wage earning capacity. To prove medical impairment under *Kethman*, a claimant must offer evidence of a physical or mental incapacitation from a work-place event. To prove qualifications and training, a claimant must offer evidence of past jobs in addition to any other skills that could transfer to the job market. Additionally, plaintiff must prove the earning capacity of those jobs; how much the jobs pay. Finally, according to the Commission's earlier decisions, a claimant must show that the medical impairment prevents the claimant from obtaining or performing all of the highest paying jobs suitable to the claimant's qualifications and training. *Riley v Bay Logistics*, 2004 ACO # 27.

The Commission, seeking to expand its pronouncements in *Kethman* and to harmonize several other opinions, issued an en banc decision, *Peacock v General Motors Corporation*, 2003 ACO # 274. In that decision, the Commission expanded its definition of qualifications and training. The Commission also highlighted the importance of the phrase, "suitable to" as it further explained qualifications and training. The Commission wrote:

Because *Sington* does not define "qualifications and training," we will. In a simple form, qualifications and training represent a plaintiff's resume. One aspect involves formal education. Another includes work experience. Still another includes special training such as the use of certain computers or computer programs. A different facet considers skills such as flight attending, lifeguarding or being trained in CPR. Finally, the term encompasses any licensure to perform a specific job or task.

Likewise, *Sington* does not define the word "suitable," but one footnote explains the statutory term. *Sington's* footnote 9 ... reads as follows:

***14 We recognize that pre-1987 Michigan case law once drew a distinction with regard to wage earning capacity between "skilled" and "unskilled" workers. A skilled worker was considered to have an impairment of earning capacity, and thus would be entitled to compensation, if a work-related injury rendered the employee unable to continue earning the same level of wages in his particular skilled employment, even if the same wages could be earned at another type of employment. See, e.g., *Kaarto v Calumet & Hecla, Inc*, 367 Mich 128, 131; 116 NW2d 225 (1962); *Geis v Packard Motor Car Co*, 214 Mich 646, 648-649; 183 NW 916 (1921). Similarly, an unskilled or "common" laborer had to show a limitation in wage earning capacity in the entire field of "unskilled" labor. See *Leitz v Labadie Ice Co*, 229 Mich 381; 201 NW 485 (1924); *Kling v National Candy Co*, 212 Mich 159; 180 NW 431 (1920). This dichotomy between skilled and unskilled labor led to some anomalous results. In *Geis*, the plaintiff was held to have a compensable disability because of an injury that precluded him from performing the skilled employment he was performing at the time of his injury even though he worked for higher wages in somewhat related employment. See *Kaarto, supra* at 131 (discussing *Geis*). Conversely, in *Leitz*, the plaintiff was held entitled to continuation of a disability award on the basis of being disabled from common labor even though he was earning higher wages as a bookkeeper and accountant**.

However, when the present definition of disability was adopted in 1987, the Legislature replaced its prior reference to a limitation in wage earning capacity in "the employee's general field of employment" with "work suitable to his or her qualifications and training." This means that the inquiry is now focused on an employee's qualifications and training, not merely the general field of employment in which the employee happened to work at the time of a work-related injury. Thus, the prior common-law skilled/unskilled dichotomy has no significance under the current statutory language. Because there is no textual basis in the statute for the selection and application of either historical definition of "wage earning capacity," we examine the plain meaning of the words found in the statute.

Thus, the term "suitable" does not limit the field of jobs. It does not necessitate prior experience or require adequate prestige according to a skill level. Rather, the list of suitable jobs encompasses those jobs that afford a plaintiff an

opportunity for consideration to be hired because he possesses the minimum experience, education, and skill. [*Peacock v General Motors Corporation*, 2003 ACO # 274 p 19-20.]

In *Stokes*, the majority opinion rejected the earlier Appellate Commission interpretations of the *Sington* decision. [1] The majority opinion reordered the burden of proof. The opinion included the following:

***15 Once the employee has credibly asserted that he cannot return to the job that pays his maximum income and the record fails to demonstrate that there is any other work suitable to his qualifications and training paying a wage equivalent to his maximum income, the employee will have established "a limitation in [his] wage earning capacity in work suitable to his or her qualifications and training." MCL 418.301(4).**

Plainly, the *Stokes* decision allows a plaintiff to satisfy the *Sington* definition of disability with significantly less proof. Under *Stokes*, plaintiff will prevail without showing that his injury caused a limitation in wage earning capacity in all the jobs suitable to his qualifications and training. While the quoted language states a possibility that the "record fails to demonstrate", the language certainly means that defendants must offer proofs beyond plaintiff's testimony or risk losing the case. In addition, *Stokes* eliminated the possibility that jobs suitable to plaintiff's qualifications included jobs that plaintiff did not perform before the injury.

This shift in the burden of proof requires a remand in almost every case to preserve due process. As the dissenting opinion in *Stokes* explained, a workers' compensation hearing must afford each party the opportunity to present its case with a proper understanding of its burden of proof. *Stokes* radically altered the burdens of each party. *Stokes* also recognized that under our previous decisions, defendants could argue that plaintiff failed to meet the burden of proof without actually presenting contrary proofs. After *Stokes*, a defendant must discontinue that practice. Observing the practical outcome from our earlier decisions, if a defendant followed our invitation to avoid costs and refrain from introducing certain contrary proofs, then due process mandates a new trial with the opportunity to offer additional proofs. Of course, if a trial would not include additional proofs, then a new trial would be unnecessary.

In this case, plaintiff testified that he ran many different machines. Under *Stokes*, plaintiff must show that his medical impairment prevents him from obtaining employment operating those machines. In addition, *Stokes* imposed an affirmative obligation on defendants to introduce proofs concerning jobs suitable to plaintiff's qualifications and training after plaintiff credibly testifies and establishes the inability to perform the highest paying job. However, defendants did not know that they were obligated to provide such proofs. We should afford defendants that opportunity.

Therefore, I would remand this case and allow defendants the opportunity to present proofs.

Gregory A. Przybylo
Commissioner

ORDER

***16** This cause came before the Appellate Commission on defendants Valenite, Incorporated and Continental Casualty Company, and Silicosis, Dust Disease and Logging Industry Compensation Fund's claims for review from Magistrate Melody A. Paige's order, mailed December 28, 2004, granting plaintiff an open award for a work-related lung condition. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Rodger G. Will
Commissioner
Martha M. Glaser
Chairperson

Footnotes

1 Commissioner Przybylo authored a lengthy dissent detailing his disagreement with the majority opinion. However, because the *Stokes* decision constitutes a precedent setting opinion under MCL 418.274(9), we follow our obligation to apply that decision's majority opinion regarding its interpretation of *Sington*.

2006 WL 1372510 (Mich.Work.Comp.App.Com.)

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Exhibit C

2013 WL 3970830 (Mich.Work.Comp.App.Com.)

Workers' Compensation Appellate Commission

State of Michigan

DOUGLAS C. STEVENS, PLAINTIFF
v.
GENERAL MOTORS COMPANY, SELF INSURED, DEFENDANT

APPEAL FROM MAGISTRATE G. JAY QUIST.

2013 ACO No. 79
Docket No. 11-0094
July 26, 2013

***1** Mark S. Farrell for Plaintiff
Carson J. Tucker for Defendant

OPINION

Goolsby
Commissioner

This matter came before the Appellate Commission on appeal by defendant of the decision of Magistrate G. Jay Quist, mailed July 14, 2011, finding defendant failed to prove its method of coordination was proper, among other issues discussed below.

Defendant argues the magistrate erred in his conclusion. Defendant further argues that the Board of Magistrates lacks the authority to resolve federal questions. Plaintiff timely filed a cross appeal arguing the United Auto Workers (UAW) did not have the authority to contract on behalf of plaintiff after plaintiff retired from defendant. Plaintiff also argues the holding in *Murphy* v *City of Pontiac*, 221 Mich App 639 (1997), does not support defendant's position.

The parties stipulated to the following facts as set out by the magistrate:
At the June 27, 2011 hearing, the facts set forth below were agreed to as the essential background facts. The parties stipulated that this and other GM coordination cases apply to GM employees who retired after March 31, 1982, and before October 1, 2007.

In 2007, the UAW and GM entered into a Collective Bargaining Agreement (CBA). The CBA provided that employees who retired on or after October 1, 2007, shall have their Workers' Compensation Benefits coordinated with their Disability Retirement Pension and Social Security Disability Benefits.

On May 16, 2009, the CBA was modified. It provided that all retirees shall have their Workers' Compensation Benefits coordinated with their Disability Retirement Pensions and Social Security Disability, **regardless of their retirement date**, beginning January 1, 2010.

On January 1, 2010, GM began coordinating plaintiff's Workers' Compensation Benefits and the benefits of similarly situated retirees based on the modified May 16, 2009 CBA. The plaintiff and others filed applications requesting full reinstatement of benefits. Plaintiff's counsel acknowledged that his client filed his application October 22, 2009, in anticipation that his benefits would be subject to coordination on January 1, 2010. Plaintiff's counsel was correct. GM began to coordinate plaintiff's workers' compensation benefits and the benefits of other relevant GM retirees on January 1, 2010. [Magistrate's opinion at 2.]

JURISDICTION

On appeal, defendant argues the Board of Magistrates does not have subject matter jurisdiction to resolve federal questions. We do not disagree with defendant's premise but note all disputes and controversies concerning compensation or other benefits are to be submitted to the Agency and all questions arising under the Act are to be determined, in the first instance by the Agency or a worker's compensation magistrate per MCL 418.841(1). Plaintiff argues the UAW does not represent retirees, citing a provision of the September 18, 2003, contract which provides that seniority is broken for an employee who retires and that that employee ceases to be an employee.

***2** The Commission has previously addressed the jurisdictional issues raised by the parties in *Arbuckle* v *General Motors LLC*, 2012 ACO #34. In that case, while not addressing any federal question, we noted whether the United Auto Workers (UAW) had authority or not to bargain for plaintiff, the result of the case, per MCL 418.354(14), would not be altered: [1]
If, the UAW possessed the authority to bargain for plaintiff, then *Murphy* applies. We find that the *Murphy* case specifically condones the ability for defendant to coordinate plaintiff's disability pension based on the changes to the agreement after plaintiff retired. The facts of *Murphy* are indistinguishable from the facts of this case. In both cases the amendments occurred after the retirement. Therefore, the magistrate erred when he forbade coordination under *Murphy*.

Alternatively, if the later amendments did not bind plaintiff because the UAW lacked the authority to bargain for plaintiff, then the amendments also would not protect plaintiff. In that case, plaintiff's agreement with defendant expired when the UAW and defendant entered a new collective bargaining agreement. When the agreement that plaintiff actually ratified expired, the prohibition against coordination also expired. Without that prohibition, defendant may coordinate all of plaintiff's disability pension. Therefore coordinating less than the entire pension complies with defendant's statutory right. [*Id.* at 6.]

We now turn our attention to the primary issue in this matter, i.e. whether defendant has a right to coordinate in this case. The magistrate, citing *Robinson* v *General Dynamics Land Systems*, 2005 ACO #238, determined that defendant has the burden of proof to establish the proper coordination:

> In *Robinson*, pertaining to the coordination of disability pensions under Section 354(14) of the Act, the Commission held that whether coordination of a pension is appropriate is far more appropriately within the knowledge of the defendant than the plaintiff. Accordingly, the defendant must provide the necessary evidence to allow coordination of a disability pension. Therefore, defendant has the burden of establishing it is entitled to coordination under the Act. [Magistrate's opinion at 5-6.]

We agree with the magistrate's assessment of which party has the burden of proof and note defendant has not challenged the magistrate's conclusion. [2] Defendant does challenge the magistrate's finding that it failed to provide sufficient evidence that the coordination in this case was proper:
The third issue is whether the defendant's method of coordination is permissible. Plaintiff argues that GM's method of coordination is impermissible because it deviates from the method of coordination outlined under Section 354 of the Act, and because it utilizes Social Security in determining the proper amount to be coordinated. Defendant argues that its method of coordination is permissible under Section 354, and Social Security is not being utilized to calculate the amount of coordination.

***3** Counsel thoroughly briefed and argued these points at the June 27, 2011 hearing. Despite extensive argument on this issue, I find that defendant did not present sufficient evidence to establish that its method of coordination is proper. Frankly, there was no substantive evidence submitted on this issue. Defendant's Exhibit A, submitted on June 27, 2011, provides that plaintiff's benefits would be subject to coordination on January 1, 2010. However, the method of coordination is unclear. Exhibit A merely contains numbers for benefits plaintiff is receiving, which could be interpreted in a variety of ways. In the *Arbuckle* case,

decided by Magistrate Birch, defendant provided testimony explaining its method of coordination which enabled Magistrate Birch to make a reasoned decision about whether the method of coordination was proper. In this case, no such evidence was submitted. Because the defendant has the burden of proof, it failed to establish that its method of coordination is proper.

The failure of the defendant to submit proper proofs on this issue is somewhat understandable. At the June 27, 2011 hearing, defense counsel agreed to withdraw the testimony relied upon by Magistrate Birch in consideration for plaintiff withdrawing affidavits relevant to the issue of equitable estoppel, an issue counsel agreed to preserve. However, this agreement does not relieve the defendant of its burden of proof. Providing a list of numbers, without an explanation as to the method of calculation, is insufficient evidence to establish that defendant's method of coordination is proper. [Magistrate's opinion at 6.]

We adopt the magistrate's findings of fact as they are supported by the record. Defendant argues that pursuant to MCL 418.354(10) it only needs to submit "... proof of the basis for a credit or reduction." Defendant's argument is sufficient as far as it goes, but once the Agency or a party challenges the coordination the burden falls upon defendant to show how they arrived at the figures utilized. Defendant essentially argues that because a plaintiff does not have to present specific arithmetic as to how his or her weekly benefit is calculated, defendant doesn't have to do so in this case. However, the difference between the two situations can be found in MCL 418.313(2):

> Each December 1 the director shall publish tables of the average weekly wage and 80% of after-tax average weekly wage that are to be in effect on the following January 1. These *tables shall be conclusive* for the purpose of converting an average weekly wage into 80% of after-tax average weekly wage. (Emphasis added).

There is no corresponding provision concerning coordination because each situation can differ depending on benefits received and/or contractual provisions. As the magistrate stated defendant did submit a set of numbers for benefits plaintiff was receiving but offered no testimony explaining the method of coordination, including how defendant arrived at the figures it used.[3] Accordingly, we agree with the magistrate's assessment that defendant failed to establish its method of coordination was proper. There is competent, material, and substantial evidence to support the magistrate's findings. We affirm.

***4** Commissioners Przybylo and Wyatt Concur.
Garry Goolsby
Commissioner
Gregory A. Przybylo
Commissioner
George H. Wyatt III
Commissioner

ORDER

This cause came before the Appellate Commission on a claim for review filed by defendant and a cross appeal filed by plaintiff from Magistrate G. Jay Quist's order, mailed July 14, 2011. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Garry Goolsby

Commissioner
Gregory A. Przybylo
Commissioner
George H. Wyatt III
Commissioner

Footnotes

1 In *Scheuneman* v *General Motors Corporation (On Remand)*, 243 Mich App 210 (2000), the Court discussed the interplay between the Employee Retirement Income Security Act (ERISA) and MCL 418.354. The Court concluded ERISA does not preempt § 354. The Court noted § 354 only affects the amount of worker's compensation benefits paid.

2 **That it is the defendant's burden to prove all elements of entitlement to coordination when that right is contested is well established**. *Scheuneman, supra; Curry v Chrysler Corporation*, **1992 ACO #374**; *Hutcherson v Detroit Board of Education*, **1999 ACO #606**; *Tyler v Livonia Public Schools*, **1993 ACO #508**; *Krastes v Haseley Construction Company*, **2004 ACO #119**; *Stevens v Valenite, Incorporated*, **2006 ACO #74**; *Fenner v Convention & Show Services, Inc.*, **2011 ACO #2**.

3 Defendant contends the magistrate made a rush to judgment. However, defendant voluntarily withdrew the information (testimony) which was introduced in *Arbuckle*. Said testimony may have explained the method of calculation in this matter, but proofs that were submitted do not explain same and in our opinion, the numbers submitted do not provide a clear explanation of defendant's method of coordination.

2013 WL 3970830 (Mich.Work.Comp.App.Com.)

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STATE OF MICHIGAN

IN THE SUPREME COURT

ROBERT ARBUCKLE, Personal Representative
of the Estate of CLIFTON M. ARBUCKLE,

Appellee,

v

GENERAL MOTORS LLC,

Appellant.

Supreme Court No. 151277
Court of Appeals No. 310611
MCAC LC No. 11-000043

/

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PROOF OF SERVICE

Donald M. Fulkerson, by his signature, verifies that, on February 17, 2016, he served the amicus curiae brief of the Michigan Association for Justice, with attached exhibits, and this proof of service on Robert J. MacDonald, 653 S. Saginaw St., Suite 200, Paterson Building, Flint, MI 48502, lawyers@disabledworker.net and Gregory M. Krause, 34977 Woodward Ave., Suite 300, Birmingham, MI 489009, gregory.krause@ogletreedeakins.com, by e-service through the Supreme Court's TrueFiling system.

/s/ Donald M. Fulkerson
Donald M. Fulkerson

Dated: February 17, 2016